Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OSCAR B. SHIRANI,

Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

and

EXELON CORPORATION,

Intervening Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

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UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued June 8, 2006
Decided June 28, 2006

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-4455

Petition for Review of an Order of the Department of Labor

OSCAR B. SHIRANI,
Petitioner,

v.

No. 03-ARB-100

UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

EXELON CORPORATION,
Intervening Respondent.

ORDER

Oscar Shirani began his career as an engineer with Commonwealth Edison, an Illinois electric utility, in 1990. In 1994, he moved into ComEd's quality assurance department, where his job involved performing audits on companies that supplied equipment or services for ComEd's nuclear power plants. By all accounts, Shirani received good assignments and favorable performance evaluations. But two incidents led to friction with his superiors.

In 1997, Shirani led an audit of a General Electric Nuclear Energy (GENE) facility in San Jose, California. His team identified a number of safety problems, [end of p. 1] and Shirani recommended that ComEd issue a stop-work against GENE, which ComEd did. In an unfortunate twist of fate for Shirani, a GENE manager with whom he had tangled during the audit, David Helwig, became, a year later, a ComEd vice-president. Shirani came to believe that Helwig was blocking his career at ComEd in retaliation for Shirani's work on the GENE audit and an argument the two of them had had during the site visit.

In 2000, Shirani conducted an audit involving "dry casks" (which are used to store spent nuclear fuel) supplied by Holtec International/U.S. Tool & Die Co. At a meeting later that year sponsored by Holtec, Shirani

piped up from the audience and asked company officials about their compliance with the report his team had issued. A federal Nuclear Regulatory Commission official was in the audience and asked Shirani to send him a copy of the audit report. At least one of Shirani's superiors indicated annoyance that the NRC had learned of the Holtec audit. The NRC official later asked Shirani why he had not issued a stop-work order against Holtec, and Shirani responded that he had been afraid of losing his job.

Also in 2000, ComEd's parent Unicom merged with PECO Energy Corp. to become Exelon Corp. Consequently, ComEd employees had to reapply for their jobs. Shirani was re-selected for the job he occupied as a principal auditor but was turned down for several management positions. Discouraged by his inability to advance in ComEd's nuclear section, Shirani sought a different audit position in Exelon's business services area. The new job raised his salary from $86,887 to $94,000. He accepted it with the understanding that the job was an opportunity to learn to be a nonsupervisory auditor and that the internal audit area would be undergoing organizational changes as the dust settled from the ComEd-PECO merger.

Eventually, the internal audit employees had to reapply for their jobs as well. Rather than reapply for the staff auditor job he was in, which

was due to be bumped down to a lower salary grade as part of the new organizational plan, Shirani applied for a management position for which he was previously warned he might not be qualified. He understood he could not remain in his staff auditor job if he did not reapply for it. Shirani didn't get the promotion, and since he had not reapplied for his old job, he was automatically terminated.

Shirani then filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration alleging violations of the whistleblower protection provision of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851. He alleged that Exelon fired him in retaliation for his participation in protected activity – namely, the 1997 GENE audit and the 2000 Holtec audit which he discussed with the NRC official. OSHA investigated Shirani's complaint and concluded there was no connection between the protected activity and his [end of p. 2] termination. An administrative law judge, after a 3-day hearing, also recommended that Shirani's complaint be dismissed. The Administrative Review Board (ARB) of the United States Department of Labor concurred with the ALJ's recommendation and dismissed the complaint. This appeal followed.

We review cases arising under the ERA according to standards provided by the Administrative Procedure Act. 42 U.S.C. § 5851(c)(1); Kahn v. U.S. Sec'y of Labor, 64 F.3d 271, 276 (7th Cir. 1995). Given Congress's

recognition of an agency's special competence to handle such matters, a court's review must be deferential. Kahn, 64 F.3d at 276. We may overturn the Review Board's decision only if we find it is "unsupported by substantial evidence" or if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E); Kahn, 64 F.3d at 276. Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence may be less than a preponderance of the evidence, ... and a reviewing body may not set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis." Kahn, 64 F.3d at 276 (citations omitted).

Under procedures established for investigations under the ERA's whistleblower provisions, Shirani was required to establish that the officials who decided not to hire him as a manager during the internal audit reselection process knew of the protected activity in which he had engaged while he was in his nuclear job, see 29 C.F.R. § 24.5(b)(2)(ii), and that the circumstances were sufficient to raise an inference that the protected activity contributed to his termination, see 29 C.F.R. § 24.5(b)(2)(iv).

The Administrative Review Board found that the company official who offered Shirani the internal audit job in 2000, Ruth Ann Gillis,

knew that Shirani had been unhappy on the nuclear side of ComEd's operations but was unaware of his clashes with superiors over the GENE and Holtec audits. Moreover, the ALJ who heard Shirnai's case made a specific demeanor-based credibility finding about Gillis's testimony, finding her to be a "highly credible witness and her testimony compelling." The head of internal audit who did not select Shirani for the management job for which he applied, Ellen Caya, also testified that she knew nothing about Shirani's previous problems and that no one ever suggested to her that she should or should not select Shirani. Gillis's and Caya's testimony clearly meets the statutory standard of substantial evidence needed to support the Board's decision that Shirani's termination was not based on his protected activity. [end of p. 3]

Shirani argues that the Board's decision was arbitrary and capricious because it failed to credit evidence that others within ComEd/Exelon besides Caya had retaliatory motives against him and that their motives somehow contributed to the decision not to hire Shirani into a job for which he had previously been warned he might not be qualified. But even if our review of the record left us persuaded that the Board overlooked some evidence favorable to Shirani's case, that would not be enough to outweigh the substantial evidence on which the Board based its decision. We are not free to set aside the Board's factual conclusion simply because we "find the opposite conclusion more

reasonable or because [we] question the factual basis." Kahn, 64 F.3d at 276.

Finally, Shirani claims that the Board's decision was arbitrary and capricious because it ignored ComEd's alleged refusal to grant his requests to return to the nuclear section. Shirani says the company's alleged refusal to allow him to return to the nuclear section "was not one discrete act; it took place over a period of time, in fact, on each day until he was given notice he was going to be let go." Shirani cites Place v. Abbott Labs., 215 F.3d 803, 808 (7th Cir. 2000), in support of his theory that the company's lack of interest in transferring him back to his old area was a "continuing violation," a situation "where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent." Id.

We cannot agree that Place supports Shirani's theory of his case. In Place we explained that "[t]he continuing violation scenario makes most sense in a sexual harassment case, where the first offensive comment or inappropriate touch may not alert the victim to the harassing quality of the conduct. A job transfer is quite different. Like being fired, demoted, or not promoted, a job transfer is a single, significant event, not a continuing act." Id. (citation omitted). Shirani has not pointed to anything in the record to indicate he ever actually applied and was turned down for a job that would have transferred him

back to the nuclear section. Thus, even if we accept as true that he communicated to company officials his desire to transfer and they chose to ignore him, such evidence would be too amorphous for us to evaluate as concrete evidence of an act that discriminated against him based on his status as a whistleblower.

For these reasons, Shirani's petition for review is DENIED, and the ARB's order dismissing Shirani's complaint is AFFIRMED. [end of p. 4]

U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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In the Matter of:

OSCAR B. SHIRANI, ARB CASE NO. 03-100
COMPLAINANT, ALJ CASE NO. 2002-ERA-28
v. DATE: September 30, 2005

COMED/EXELON
CORPORATION,
RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael C. McDermott, Esq., *Chicago, Illinois*

For the Respondent:
Scott E. Gross, Esq., Darren R. Reisberg, Esq.,
Sidley Austin Brown & Wood,
Chicago, Illinois

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Energy

Reorganization Act, 42 U.S.C.A. § 5851 (West 2003), and implementing regulations at 29 C.F.R. Part 24 (2005). Oscar Shirani complains that his employer, Business Services Company, a subsidiary of the Exelon Corporation, violated § 5851 when it terminated his employment in December 2001. On April 30, 2003, a Labor Department Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) recommending that Shirani's complaint be dismissed. For the reasons that follow, we concur and dismiss the complaint.

BACKGROUND

Oscar Shirani holds a Bachelor of Science and Masters degrees in civil engineering. Tr. 45. He commenced his employment with Commonwealth Edison

Company (ComEd) in 1990 as a structural engineer. Tr. 45, 54. In 1994, Shirani moved to the Supplier Evaluation Services (SES) group in ComEd's Quality Assurance Department. Tr. 68, 252. Shirani's primary duties in SES were to perform audits of nuclear suppliers who provided material or services to ComEd's nuclear power generation plants. Tr. 743.

In October 2000, ComEd became a subsidiary of the Exelon Corporation. Tr. 665. Shortly thereafter, Shirani moved to another

Exelon subsidiary, Business Services Corporation (BSC), to take a position as a non supervisory auditor in the internal audit unit. Tr. 396.

In October 2001, BSC substantially restructured internal auditing, created new positions, and posted the positions for bidding by Exelon employees. All employees were required to reapply for their jobs. Tr. 489. Though Shirani had no management experience and was still learning how to conduct financial audits, he applied for a principal/manager auditor position. Tr. 549. Shirani did not apply for the non-supervisory position he currently held, though encouraged to do so. Tr. 543. The internal audit manager rejected Shirani's application for principal auditor and instead selected applicants with substantial management and financial auditing experience. Tr. 546, 556-557. Since Shirani did not apply for the non-supervisory position he currently held, Com Ed/Exelon automatically terminated his employment. Tr. 398.

Shirani filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that ComEd/Exelon terminated his employment "in retaliation for his participation in Nuclear Regulatory Commission (NRC) proceedings." CX 1 at 1. After an investigation, OSHA found Shirani's complaint to be without merit.

Shirani appealed OSHA's finding. A hearing was held in December 2002.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the

agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). In weighing a witness's testimony, the fact-finder considers the relationship of the witness to the parties, the witness's interest in the outcome of the proceedings, the witness's demeanor while testifying, the witness's opportunity to observe or acquire knowledge about the subject matter of the witness's testimony, and the extent to which other credible evidence supported or contradicted the testimony. *Jenkins v. United States Envtl. Pro. Agency,* ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB will defer to an ALJ's credibility determinations that are based on such observation. *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000). *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) ("The Board gives great deference to an ALJ's credibility findings that 'rest explicitly on the evaluation of the demeanor of witnesses. '"), *citing NLRB v. Cutting,* 701 F.2d 659, 663 (7th Cir. 1983)).

FINDINGS OF FACT

Having reviewed the entire record, the ALJ's recommended findings of fact, and the parties' arguments on review, we make the following findings of fact. In so doing, we defer to the ALJ's credibility finding that Ruth Ann Gillis, whose testimony contradicted Shirani's testimony in significant part, "was a highly credible witness and her testimony compelling." R. D. & O. at 24. We also note that our findings of fact are consistent with the ALJ's findings in all material respects.

ComEd merger with PECO and creation of Exelon in 2000

ComEd, a subsidiary of Unicom, operates power generation plants in the Chicago area. Tr. 54. In October 2000, Unicom Corporation merged with PECO Energy Corporation, which operated power generation plants around Philadelphia. ComEd and PECO became subsidiaries of Exelon Corporation. Tr. 664-665.

The ComEd and PECO workforces were merged and downsized in a "re-staffing" process. Tr. 763. The re-staffing consisted of three steps: Exelon first determined its new staffing needs. Exelon then posted the new positions on the company computer network. Tr. 358-359. Any ComEd or PECO employee who wanted to work for Exelon could apply for a position. Incumbents who did not apply for a position were automatically terminated with severance benefits that included severance pay and re-

employment assistance. Workers who applied but were not selected were also automatically terminated with severance benefits. RX 33.

In 2000, Shirani re-applied for the principal auditor position he already held in SES. Tr. 263, 763, 769. But he really wanted a promotion and applied for some management positions as well. Tr. 358-359, 361. Shirani was not selected for any of the management positions for which he applied, but he was re-selected for his SES principal auditor job. Tr. 470-471.

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Shirani's career in SES from 1994 until January 2001

In his capacity as an SES auditor, Shirani participated in or served as group leader in numerous audits of nuclear equipment manufacturers and service providers. Tr. 82, 87. When he served as group leader, it was his responsibility to write the audit report, which included information about deficiencies, if any, in the audited product or service, and to make recommendations for remedial action. 84, 122, CX 17.

Shirani's SES supervisor approved every audit report and recommendation for remedial action that Shirani made. Tr. 435, 442-446, 447, 755-757, 787, 796. During his tenure in SES, Shirani received a promotion, favorable

performance evaluations, important assignments, and frequent praise from his supervisor. Tr. 76-77, 82, 93, 438-439 When Shirani's supervisor re-selected him for the principal auditor position in 2000, he chose Shirani over other incumbents, whose employment was terminated.

Nonetheless, Shirani testified about two incidents which, he argues on review, show that high-level officials in ComEd were hostile to Shirani's work in SES. One involved an audit in 1997 at the General Electric Nuclear Energy (GENE) facility in San Jose, California. The other involved an industry symposium on the east coast in 2000.

In the 1997 GENE audit, Shirani and his team identified numerous safety deficiencies in the audited operations. Tr. 112 -122. During the exit interview, Shirani and one of GENE's managers, David Helwig, argued about Shirani's unwillingness to give GENE credit for corrective action it was already taking on its own. Tr. 209-212. In his report, Shirani recommended that ComEd issue a stop work order. Shirani's supervisor approved Shirani's report and stop-work recommendation and both were put into effect. Tr. 120-124, CX 4, CX 5.

In 1998, Helwig became a vice president of ComEd and participated in an effort to increase ComEd's nuclear power output. Tr. 174, 338. Over the next two years, Shirani

sought Helwig out half a dozen times for career advice. Tr. 186-187, 230-231, 236, 466-467. "David, I need your assistance to mentor me more than any other time. . . . Please set up a convenient time that I can see you more frequently for mentorship. I really appreciate your help. Thanks!!!" RX 42 (September 7, 2000 email). Helwig encouraged Shirani to stay in nuclear auditing because that is Shirani's area of expertise. Tr. 186-189.

The second incident occurred in November 2000. Although he was not invited, Shirani attended an industry symposium sponsored by Holtec International. During an open discussion, Shirani raised questions relating to a Holtec audit in which he had participated. Tr. 17-18. Also attending the symposium was a Nuclear Regulatory Commission engineer, Ross Landsman. Tr. 18-19. After the discussion period, Landsman asked Shirani for a copy of the audit report. Tr. 401. Shirani passed on Landsman's request for the report to the appropriate office at ComEd, which forwarded the report to Landsman. Tr. 21-23, 401-402, 782. In January 2001, after Shirani had left

SES, Landsman called Shirani and asked him why he did not issue a stop work order against

Holtec. Tr. 24-25. Shirani told Landsman he was afraid of losing his job. *Id.*; 400-403.[1]

Move to BSC internal auditing

In early 2000, Shirani approached Ruth Ann Gillis, Vice President and Chief Financial Officer of Unicom, and asked her to be his mentor. Tr. 664. After that he often complained to her about his limited opportunities for advancement in SES. "I need your help because I am not getting it at our nuclear side of the house and I want to jump." RX 8; cf. Tr. 669-672.

Around the time of the general merger, Shirani asked Gillis for a job in business services. Tr. 678. Gillis explained to Shirani that ComEd and PECO's internal audit departments would not merge until the following year. ComEd had been outsourcing most of its internal auditing to Arthur Anderson in Chicago. PECO had an in-house internal audit unit in

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[1] Shirani testified in great detail about the GENE audit and the NRC contact, as well as other events that, he argues, show that ComEd executives involved in nuclear power generation conspired against him because his nuclear safety standards were higher than theirs. However, Shirani failed to establish any connection between these alleged events and the adverse action of which he complains – non-selection for a principal auditor position in BSC. Thus, we recount this abbreviated version of Shirani's history in SES primarily to assist the reader in understanding Shirani's theory of the case.

Philadelphia. Tr. 677, 506. Before merger and re-selection could begin, BSC would need to decide on the best structure for the integrated internal audit function. Gillis planned to hire a General Auditor sometime in 2001 to guide the reorganization and reselection. In the meantime, if Shirani were to take an internal auditor position in Chicago, he would have to report to Arthur Anderson, work without a formal position description, and be prepared for whatever changes the General Auditor might make. Tr. 397, 506, 675-682, 715-720; RX 9. In short, giving Shirani a job in internal audit at that point would mean Shirani could acquire new skills, especially in financial auditing but, Gillis emphasized to him, she was making "no promises whatsoever about Oscar becoming a manager." Tr. 720.

At the time Shirani asked Gillis for a job in finance, his SES salary was $86,887, in pay band E-3. The maximum salary for pay band E-3 was $100,000. RX 9; Tr. 662. The principal auditor position Gillis offered Shirani in December 2000 had a salary of $92,500, in pay band E-4. The maximum salary for pay band E-4 was $126,000. RX 9, Tr. 662; 682-685; Tr. 387. Thus, Gillis' offer meant a promotion from pay band E-3 to E-4, an immediate pay raise of 6.46 % and the opportunity to increase his salary by as much as $26,000 in future merit pay increases. Tr. 661.

Shirani was disappointed with Gillis' offer. He complained that it was not a promotion to a management position and that he would have commuting expenses in the new job that he had not had as an SES auditor. Tr. 478, 682-683. Gillis was sympathetic

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to the commuting costs issue and increased the offer to $94,000. Tr. 682-685; RX 9. Shirani took time to think it over and then accepted the revised offer on December 19, 2000. Tr. 480. He began his new job at BSC on January 15, 2001. Tr. 396.

Shirani participated in several internal audits over the next ten months under Arthur Anderson supervision. Tr. 689. In his first formal performance evaluation, Arthur Anderson gave him an overall rating between "achieves expectations" and "developmental." RX 2. On his second evaluation, Arthur Anderson rated Shirani one step higher, between "achieves expectations" and "commendable." *Id.*

Internal auditing merger and re-selection process

In April 2001, Gillis hired Ellen Caya from the accounting firm Price Waterhouse Coopers to fill the position of Director of Internal Audit. Tr. 524. In July, Caya gave Shirani and the Philadelphia auditors mid-term evaluations

based on five criteria: technical expertise, industry knowledge, productivity, leadership/management skills, and problem solving. RX 1. Caya decided to give everyone an official rating of "on track" because the standards were being applied retroactively. Tr. 528-530. However, she also gave Shirani specific critical feedback based on her discussion with his Arthur Anderson supervisors and her own experience with him in May, June, and July. Tr. 531. Caya told Shirani that he needed more supervisory experience and to work on financial auditing and problem solving skills. Tr. 535, 553-556, 570-574, RX. 1.

Caya's reorganization mandate was to evaluate the internal auditing arrangements Exelon had inherited from Unicom (in Chicago) and PECO (in Philadelphia), propose an internal audit department suited to Exelon's needs, and run the resultant operation. Tr. 524, 526, 537. To that end, Caya elicited the views of an audit committee and senior managers on questions such as whether to outsource the internal audit function or bring it in-house, communication protocols, reporting, and other management and staffing issues. Tr. 538. Based on this information, Caya concluded that the internal audit function should be performed almost entirely in-house, with headquarters in Chicago and offices in both Chicago and Philadelphia. *Id.* Using statistical criteria and ratios between corporate assets and revenues, Caya calculated the appropriate size for the department, number

of staff, and ratios of managers to staff. Tr. 539. Caya then developed an organizational structure that provided for a General Auditor (Caya's position) in Chicago, one director, two principal/manager auditors and 11 senior/staff auditors in Chicago, and one director, one principal/manager auditor and three senior/staff auditors in Philadelphia. RX 3; Tr. 540. Caya recommended that the senior/staff auditor salaries be graded E-4, the principal/managers be E-5s, and the directors be E-6. Tr. 540.

All of Caya's recommendations were approved except the salary levels. Tr. 541, 579, 693, 694-695. Caya's pay grade as General Auditor was E-6. Under her proposal, the Chicago and Philadelphia office directors who would be reporting to her would also be grade E-6. Company rules prohibited one E-6 from reporting to another E-6.

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Therefore, Caya had to downgrade each salary level below her one step, reducing the senior/staff auditors to E-3s. Tr. 541.[2]

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[2] Subsequently, Caya became vice president of internal audit with an E-7 salary, and all the positions below her were upgraded one level, bringing the senior/staff auditor positions to the E-4 she had originally recommended. Tr. 576-577.

Caya developed position descriptions. Tr. 545-546. Both the senior/staff auditors and principal/manager auditors had to be competent in seven categories: business risk assessment, business process analysis, analytical skills, industry experience, oral and written communication, problem solving/logic, and adaptability/quick learning. Principal/manager auditors had to be competent in four additional categories: leadership, negotiation, interpersonal skills, and multi-tasking. RX 5, RX 7, Tr. 546-549.

Caya wanted the principal/manager auditors to have extensive experience in financial, operational, and compliance auditing and strong management backgrounds. Tr. 527. Although Caya wanted staff auditors to have professional auditing or accounting accreditation and five to eight years internal audit experience, she was willing to accept other combinations of skills. For instance, she thought Shirani's experience auditing nuclear power generation equipment for safety and compliance with legal and other requirements would add a valuable perspective for an internal audit team whose other members had more conventional accounting and financial backgrounds. Tr. 544, 547, 558.

Shirani's application for principal/manager auditor

In August and September 2001, Shirani asked both Caya and Eliecer Palacios, Exelon

director of ethics and compliance, whether he would be automatically disqualified for the E-4 principal/manager auditor position because he did not have eight to ten years financial audit experience. Caya and Palacios (after checking with Caya) both told Shirani that his lack of financial audit experience, plus the fact that he lacked management experience probably did disqualify him for the principal/manager positions but that his credentials made him a good candidate for the E-3 senior/staff auditor position. Tr. 543, 561, 594, 600.

Once Caya's merger proposal was approved, the new internal audit department had to undergo the re-staffing process that the rest of the company had undergone in 2000. Tr. 541, 583. The rules were the same: no one would be considered for a position for which he or she did not apply, and employees who submitted no applications or were not selected were automatically shunted into the severance process. Tr. 489, 545, 560, 642-643; RX 4. On October 5, 2001, Caya posted all the new internal audit positions. RX 4; Tr. 542-543. Shirani understood that he could not be considered for the E-3 staff auditor position if he did not apply for it. Tr. 489.

However, he decided not to apply for the E-3

position because he was already near the top of the E-3 salary band and because he did not want to lose the title, principal auditor. Tr. 544, 551, 651. He did apply for the E-4 principle/manager position. Tr. 490-491; RX 35. Caya did not select Shirani for an E-4 slot because she did not rate him high on analytical, negotiation or interpersonal skills or communication, problem solving, or adaptability, and because he had little financial audit or supervisory experience. RX 6; Tr. 493, 726. Instead, Caya selected two Arthur Anderson managers who had worked as contract auditors for ComEd and had strong financial audit and managerial backgrounds. Tr. 556-557. On October 26, 2001, Caya officially informed Shirani that he was not selected for a principal/manager auditor position and that in consequence his employment would be terminated effective December 26, 2001. Tr. 499; RX 33. Caya testified that neither Gillis nor anyone else told her anything about Shirani's history in SES or tried to influence her decision whether to hire Shirani as a principal/manager auditor. Tr. 561, 563-565.

DISCUSSION

The Legal Standard

Under the ERA whistleblower provision, it is unlawful for an employer to "discharge . . . or otherwise discriminate against any employee

with respect to his compensation, terms, conditions, or privileges of employment because the employee" participated in a proceeding or in any other action to carry out the purposes of the ERA or the Atomic Energy Act of 1954. 42 U.S.C.A. § 5851(a). An employee establishes a violation of § 5851 by proving by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer subjected him to an adverse employment action, (3) the employer was aware of the protected activity, and (4) the protected activity was a contributing factor in the employer's decision to take adverse action. *Hasan v. Sargent & Lundy,* ARB No. 03-030, ALJ No. 2000-ERA-7, slip op. at 3 (ARB July 30, 2004).

Where a complainant alleges that the adverse action was the prospective employer's refusal to hire him, the complainant must also establish that: (1) he applied and was qualified for a job for which the employer was seeking applicants; (2) despite his qualifications, he was rejected, and (3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

Shirani failed to carry his burden of proof

1. Protected Activity

On the question of protected activity, Shirani contended that during the period 1997 through January 2001, he raised concerns within ComEd SES and to the Nuclear Regulatory Commission about safety deficiencies in products and processes that ComEd

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used in its nuclear power generation plants. Exelon/BSC has not argued that Shirani's complaints while in SES were not protected by § 5851. Accordingly, the ALJ deemed that element of Shirani's case admitted. R. D. & O. at 21. Because we decide this case on other grounds, we assume without deciding that Shirani engaged in activities protected by § 5851.

2. Adverse Action

With respect to adverse action, the ALJ identified two adverse actions: failure to hire Shirani as an E-4 principal/manager auditor, and termination from employment. R. D. & O. at 21-22. Again, because Exelon/BSC did not argue that Shirani was not subjected to an adverse personnel action, the ALJ deemed that element of Shirani's case admitted. *Id.* at 22. We assume without deciding that Exelon/BSC took adverse action against Shirani by rejecting him for the principal auditor position for which he applied and for terminating his employment with BSC.

3. Employer knowledge and causal connection

The ALJ concluded that Shirani failed to prove that the persons who had input into the decision not to offer him a principal auditor position were aware of Shirani's safety activities while he was employed in SES from 1997 through January 2001. R. D. & O. 23. Nor did the ALJ find any other evidence of a causal connection between Shirani's activities in SES and his non-selection at BSC. *Id.* at 26. The overwhelming weight of the evidence supports the ALJ's findings and conclusions. Therefore, Shirani's case fails and we must dismiss his complaint.

Shirani asked Gillis for a job in her financial operations in late 2000, around the time of the merger. Gillis told him the only position he might be qualified for was internal auditing. But ComEd's internal audit function was going to be merged with PECO's, and the results of the merger could be anything from a wholly-outsourced audit function to a 100% in-house organization. She would be hiring someone to create an internal audit strategy for the merged companies. Thus, Gillis was not in a position to guarantee Shirani anything other than an opportunity to learn to be a non-supervisory auditor in the ComEd unit in Chicago, to be there when incumbents would have a chance to apply for new positions should they be created, and to find out in the course of auditing what

other opportunities there might be for him in Exelon's subsidiaries.

Gillis testified that she knew from Shirani that he had been dissatisfied in SES because he wanted a promotion and salary increase that were not forthcoming there. But, she also testified, she was not aware of Shirani's encounter with Helwig at GENE or his conversations with NRC's Landsman, or any other conflicts between Shirani and his superiors while he worked at SES. None of the managers and executives who knew about Shirani's work in SES ever spoke to her about him. The ALJ made a specific demeanor-based credibility finding about Gillis' testimony. "I find Ms. Gillis to be a highly credible witness and her testimony compelling. Moreover, Ms. Gillis' testimony is supported by the evidence in the record." R. D. & O. at 24.

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Caya testified that she, too, knew nothing about Shirani's work at SES and that no one ever suggested to her that she should or should not select Shirani. Nothing in the record calls Caya's testimony into doubt.

4. Shirani's objection on review

Shirani admits that he lacked both the supervisory and financial auditing qualifications for which Caya was looking. C. O. Br. at 2; Tr.

490-491. Nor does he dispute that Caya hired applicants for the E-4 principal/manager auditing positions who met Caya's criteria. And he testified that he did not apply for the E-3 senior/staff auditor position – for which Caya had already told him he was probably qualified – because he wanted the principal auditor title and the E-4 salary range. Tr. 490-491.

Nonetheless, Shirani argues that the ALJ erred in finding that BSC rejected him for non-discriminatory reasons. Shirani contends that the ALJ focused on the wrong question. "The Complainant's unanswered complaint is based on the theory that he was terminated as part of a broad conspiracy by ComEd to cover up the safety issues raised by Complainant since 1977." C. Op. Br. at 2. "The 'lone manager theory' that one new hire [Caya] made the decision to terminate the Complainant without contact from anyone in upper management and in solitude, is too preposterous to believe and cannot be reconciled with the events of late November and early December 2000 [when Gillis offered and Shirani accepted the auditor position]." *Id.* at 6.

Shirani contends that Helwig was prejudiced against him because of the GENE exit interview and that other ComEd managers wanted to get rid of him because of his contacts with NRC through Landsman. To Shirani, the only conceivable explanation for the end of his career at BSC is that people on the nuclear side of the

business influenced Gillis to lure him over to BSC where his credentials would be comparatively weak and the reorganization could be managed so there would be no positions for which he could qualify.

Shirani's theory barely rises to the level of rank speculation. The record conclusively demonstrates that Shirani voluntarily moved from SES to BSC, refused to apply for a position for which he had been told he qualified, applied only for a position for which he concedes he was not qualified, and as a result automatically passed into the severance process. Even if Shirani had demonstrated, which he did not, that he made safety complaints at SES which angered supervisors or managers, the lack of any evidence that Gillis or Caya knew about these events absolutely precludes Shirani's claim of retaliation.

We note that even as the ALJ analyzed the record and made findings on each of the four elements of a successful complaint – protected activity, adverse action, employer knowledge, and causal connection – he also sometimes couched his discussion in terms of the prima facie case. R. D. & O. at 21, 22, 23, 26. However, once a case is fully tried on the merits, "we move beyond the question of whether Complainant has presented a prima facie case." *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip

op. at 9 (ARB July 31, 2002) (citing *United States Postal Serv. v. Aikens*, 460 U.S. 711, 714 (1983). Thus, we disregard the ALJ's finding that Shirani did not make a prima facie showing of failure to hire.[3]

Accordingly, we **DENY** the complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[3] The ALJ also mistakenly wrote that "a complainant must show that the protected activity was the **likely** reason for the adverse action." R. D. & O. at 24 (emphasis added). However, the complainant must show only that the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C.A. § 5851(b)(C). This misstatement of the complainant's burden is de minimis, because the ALJ's ultimate finding of fact, that Shirani's protected activity played no role in the adverse action, is supported by a preponderance of the evidence.

USDOL/OALJ Reporter

Issue Date: 30 April 2003

Case No: 2002-ERA-28

In the Matter of:

OSCAR B. SHIRANI,

Complainant

v.

COMED/EXELON NUCLEAR,

Respondents

APPEARANCES:

Michael C. McDermott, Esquire,

For the Complainant

Scott E. Gross, Esquire, and

Darren R. Reisberg, Esquire,

For the Respondents

BEFORE: ROBERT J. LESNICK

Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Procedural Background

This case arises under the Energy Reorganization Act of 1974 ("ERA" or "the Act"), 42 U.S.C. 5851 (1988 and Supp. IV 1992), and the regulations promulgated thereunder at 29 C.F.R. Part 24 ("the Regulations"). The Complainant initially filed his written complaint on February 28, 2002,[1] alleging violations of Section 211 of the ERA. The Complainant specifically alleged that he was transferred to a different position on December 1, 2000, and terminated on October 26, 2001, in retaliation for contacting the Nuclear Regulatory Commission ("NRC") on November 30, 2000.

The Occupational Health and Safety Administration ("OSHA") investigated this matter. The investigative report, dated May 24, 2002, and approved on June 3, 2002, found the Complainant's claims to be without merit. Thus, because the evidence did not substantiate the Complainant's allegation, OSHA recommended that the case be dismissed. On June 10, 2002, the Complainant filed a letter of appeal, requesting a formal hearing. This case was then assigned to the Office of Administrative Law Judges.

On October 2, 2002, the parties submitted an Agreed Protective Order, and on October 8, 2002, I issued the Protective Order. The Respondents filed a Motion for Summary

Decision on October 24, 2002. On October 28, 2002, Respondents next filed an Emergency Motion for a Protective Order Prohibiting the Deposition of Oliver Kingsley. A conference call with the parties was held, and on November 7, 2002, I issued an Order Rescheduling Hearing and Setting Briefing Schedule, to allow the parties to brief the Respondents' various motions.

The Complainant filed his Response to Respondents' Emergency Motion for 29 C.F.R. 18.15 Protective Order on November 14, 2002. On November 18, 2002, the Respondents filed their Reply Brief in Support of Their Emergency Motion for Protective Order. The Complainant then submitted his Response to Motion for Summary Decision on November 19, 2002. Likewise, on November 25, 2002, the Respondents filed a Reply Brief in Support of Their Motion for Summary Decision.

On December 4, 2002, after considering the parties' arguments, I concluded that Mr. Kingsley could offer relevant and material information and the Complainant expressed a willingness to minimize the impact of the proceeding on Mr. Kingsley's schedule. On the issue of summary judgment, I found that the Complainant had alleged the four elements of a *prima facie* case because three of the requisite elements were uncontested, and the Complainant asserted that the evidence would ultimately demonstrate a causal nexus between the protected activity and adverse action.

Moreover, there was a dispute over material facts at issue. Accordingly, I issued an Order Denying Respondents' Emergency Motion for Protective Order and Order Denying Respondents' Motion for Summary Judgment.

Subsequently, on December 9, 2002, the Respondents filed an Emergency Appeal of the Denial of Respondents' Motion for a Protective Order Prohibiting the Deposition of Oliver Kingsley with the Administrative Review Board ("the Board"). The Respondents further filed a Motion to Stay the Deposition of Oliver Kingsley and to Certify for Interlocutory Review the December 4 Order with this Court. By facsimiles dated December 9, 2002, the Complainant filed a Response to Emergency Motion to Stay the Deposition of Oliver D. Kingsley, Jr., and his Pre-hearing Report. Later that day, the Respondents also filed its Pre-hearing Memorandum. The Complainant then filed his Response to Respondents' Emergency Appeal on December 10, 2002, with the Board.

On December 10, 2002, the Board issued its Final Order Denying Emergency Appeal of the Denial of Respondents' Motion for a Protective Order. The Board noted its policy against interlocutory appeals, citing the final decision requirement in 28 U.S.C. 1291. According to the Board, the final judgment requirement mandates that appeals may not generally be heard until the trial court has issued a decision that ends the litigation on the merits. Appeals, then, should be combined in one review, to allow for

an effective and efficient appellate process when a final judgment is issued. The Board noted, however, that an exception for collateral issues is an accepted exception, permitting appeals when an issue or right is too important and independent to require deferring appellate judgment until after a final judgment is issued. The Board concluded that the Respondents had failed to present a basis for departing form the strong policy against interlocutory appeals. Accordingly, the Board denied the Respondents' emergency appeal.

The Respondents, also on December 10, 2002, filed a Motion in Limine to Exclude Certain Testimony and Evidence. The Complainant responded to the motion the next day. On December 12, 2002, I issued an Order Denying Respondents' Motion in Limine to Exclude Certain Testimony and Evidence, concluding that the testimony of Complainant's witness was relevant to his theory of the case.

A hearing was ultimately held in Chicago, Illinois on December 17, 18 and 19, 2002. The parties were given an opportunity to examine witnesses and introduce evidence. Both parties filed post-hearing briefs.

References to "CX" indicate a Complainant's exhibit. "RX" refers to a Respondents' exhibit. References to "ALJX" pertain to the exhibits of the Court. The transcript of the hearing is cited as TR and by page number. The Claimant admitted 26 exhibits into the record, numbered

CX 1, 2, 4-9, 11-15, 17, 19-23, 26-32. The Respondents admitted 40 exhibits into the record, numbered RX 1-8, 10-17, 19-22, 25-30, 32-36, 38-46. The Complainant's pre-hearing report was marked ALJX 1, and the Respondents' pre-hearing memorandum was marked ALJX 2.

The discussion and recommendations set forth in this decision are based upon my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not specifically mentioned, has been carefully reviewed and thoughtfully considered. Likewise, the findings and conclusions are based on the undersigned's observations of the appearance and demeanor of the witnesses who testified at the hearing as it affects their credibility.

Factual Background

Exelon Corporation formed as a result of the merger of Unicom Corporation, the parent company of Commonwealth Edison ("ComEd"), and Philadelphia Electric Company ("PECO"), in October 2000. (TR 664-665). Exelon Business Services Company ("Exelon BSC") is a subsidiary of Exelon Corporation. (TR 665). Exelon Generation Company ("Exelon GENCO") is the corporate entity that owns and operates the nuclear plants licensed by the NRC. (*Id.*) Exelon BSC has never owned or operated any nuclear power plants, nor does it have any licenses from the NRC. (TR 665-666).

Oscar Shirani applied for a position with ComEd, and was hired on May 21, 1990. (TR 45-46). His first job was that of a Structural Engineer in the Mechanical Structural Group. (TR 54). He held various positions, including Principal Engineer, Lead Senior Engineer, SES Specialist, Quality Assurance Administrator, and Senior Lead Auditor. In December 2000, shortly after the merger and the creation of Exelon, Mr. Shirani accepted a position with Exelon BSC. In January 2001, he moved away from the nuclear division to his new post as an Auditor for the Internal Audit department. The Complainant's employment was terminated on October 26, 2001. On February 1, 2002, the Complainant made an oral statement to the Department of Labor, and on February 28, 2002, the Complainant filed his written complaint under the ERA with OSHA.

Testimonial Evidence

Oscar Shirani

Mr. Oscar Shirani, the Complainant, is currently unemployed; however, he is trying to work as a consultant and is assisting a company by writing their quality assurance program. (TR 45). He holds Bachelor of Science and Masters degrees in Civil Engineering. (*Id.*) Mr. Shirani has 14 years of experience in civil structural design analysis, mechanical structural seismic analysis, weak link analysis, and stress

analysis. (*Id.*) He also has seven years of quality assurance audit experience. (TR 46). He was first hired by Commonwealth Edison in May 1990. (TR 45).

Mr. Shirani was hired as a Principal Engineer, and, in 1993, he was promoted to Senior Lead Engineer. (TR 67, 519). In late-1994, he joined the Quality Assurance Department with the Supplier Evaluation Services Group ("SES"). (TR 68). At the recommendation of an auditor, Mr. Shirani spoke to the SES Director, Ed Netzel; Mr. Netzel hired the Complainant, despite an absence of any openings, stating that he always needed technical people. (TR 75-76). Approximately nine months later, Mr. Shirani was promoted to Lead Auditor. (TR 78). Mr. Shirani testified that he led his first audit around autumn 1995, less than one year since he joined the department. (*Id.*)

According to Mr. Shirani, prior to 1997 he received the highest achievement award in Engineering, and recognition for outstanding achievement. (TR 86). He received promotions, from SES Specialist to Quality Assurance Administrator. (TR 93-94). In August 1997, Mr. Netzel assigned the Complainant to lead the audit of General Electric Nuclear Energy ("GENE") after the NRC sent a confirmatory letter to ComEd. (TR 95). The NRC sent the letter after discovering that the wrong parts were used. (TR 96).

Mr. Shirani testified that he sent General Electric ("GE") a letter, informing them that the audit would be taking place and explaining the scope of the review. (TR 99-100). The Complainant stated that he next asked GE "to send the jobs they had done" for the past three years, to enable the auditors to review the calculation and analyses. (TR 100). GE responded by acknowledging the size of the effort involved to amass the requested information; Mr. Shirani stated that he had the Engineering Department send GE $5,000 three months in advance to make the information available. (TR 100-101). He also said that he gave them 30 days notice prior to his arrival, summarizing the scope of the audit, citing the standards that applied, and listing the company's procedures that had already been reviewed and accepted by the auditors. (TR 101).

On August 18, 1997, Mr. Shirani and his team held the entrance meeting with GE at their San Jose, California headquarters. (TR 103). Over the course of the audit, Mr. Shirani and his team made 21 audit findings. (TR 111). Mr. Shirani described a confrontation that ensued with David Helwig at the exit meeting. (TR 112-117). The findings resulted in a stop work order, which, according to the Complainant, was approved by Mr. Netzel's boss. (TR 119). Mr. Shirani explained that the practical effect of a stop work order is to stop production after finding a significant quality assurance program

breakdown in all aspects of the sample chosen. (TR 124).

Mr. Shirani noted that he believed his audit findings were massaged in the final report, in violation of the federal regulations. (TR 454-456). He stated, however, that he assumed Mr. Netzel made the alterations, but he could not assert as much with any level of certainty. (TR 455-456).

Mr. Shirani testified that during 1998, he was asked to lead a follow-up audit of GE and was promised a team of technical specialists; however, the number of specialists was substantially reduced and the scope of his role was changed. (TR 256-257). Mr. Shirani also noted that in 1998, the SES staffing level was reduced from twelve to four. (TR 269-270). During that same time, although the overall number of suppliers decreased, the number of vendors Mr. Shirani supervised increased due to the reduction in the workforce. (TR 271).

When Mr. Shirani was preparing to return to GE for the follow-up audit, he said he received a call from a manager at the LaSalle Station, who expressed his concern that Mr. Shirani's audit would cause additional delays in the power upgrade project. (TR 336-337). The Complainant defined the power upgrade project as "increasing the thermal output of the reactors, and by increasing the power, the output to the generator to create more electricity. In another word, ... you are squeezing the metal to get more juice out of it." (TR 337). He explained that the

power upgrade program began around late-1998, and was supported by Mr. Helwig and Mr. Kingsley. (TR 337-338). General Electric was heavily involved in ComEd's power upgrade projects. (TR 338).

Mr. Shirani discussed generally some of the audits he performed for ComEd. He also noted that during the merger period, he was conducting audits, but he was also applying for positions within the new company. (TR 358). He was allowed to nominate himself for four positions, which he did; he was also able to ask a supervisor for two additional nominations. (TR 360). Accordingly, Mr. Shirani stated that he asked Mr. Bastyr to nominate him for two positions, out of a list of four or five possibilities, including some outside SES. (TR 361). However, the Complainant asserted that Mr. Bastyr did not nominate him for the requested positions. (TR 413; CX 31). Mr. Shirani testified that none of the four self-nominated positions, or the positions given to Mr. Bastyr, were related to internal audit in any way; in fact, he stated that he was unaware of what "business services" meant, or that the company had an internal audit department. (TR 362).

During his time on an audit for Holtec/U.S. Tool & Die in Pittsburgh, Pennsylvania, Mr. Shirani stated that he was hampered in completing his tasks. For instance, on the first day of the audit, he said he received a call from Tom Joyce's office, telling him to report to Philadelphia to meet with the President of Exelon BSC. (TR 364).

The Complainant said he was to be interviewed for the position of Vice President of Supply, despite not applying for the position. (TR 366-367). He was unaware if someone nominated him for the position. (TR 473). In Mr. Shirani's absence, several members of his team received a call to work on another project. (TR 368). The group ultimately had to return at a later date to complete the audit. (TR 369).

While he was writing his audit report, Mr. Shirani was told that he was going to interview for the position of SES Manager. (TR 370). Mr. Shirani again stated that he had not applied for this position, nor was he aware that the position was open. (TR 371). At that time, the position was held by his boss, Mr. Bastyr. (TR 372). After his interview, Mr. Shirani said he was called to the Human Resources Department, where he had a phone interview with someone from PECO for about four minutes. (TR 373-376). Mr. Shirani also interviewed for Director of Supply for Exelon BSC, a job for which he said he did not apply. (TR 376-377).

Mr. Shirani stated that he thought these interviews were related to his contacts with Ms. Gillis or Mr. Clark. (TR 381). Mr. Shirani said that he explained his frustration in not moving up the ladder in the nuclear division to Ruth Ann Gillis and Frank Clark; he asked them to mentor him and help him find a leadership role in Exelon. (TR 378-380, 476). The Complainant said that on December 7, 2000, Ms. Gillis discussed several possibilities, and ultimately

offered him a job as an Internal Auditor. (TR 387-390). He further said that Ms. Gillis called him again on December 13, just prior to her vacation, to let him know how to contact her while she was away. (TR 392). Mr. Shirani stated that he never called her, but she called him on December 19, attempting to convince him to accept a position with her and reject a position in nuclear as Diversity Manager. (TR 393-394).

Mr. Shirani said that he ultimately took himself out of consideration for the position in the nuclear division, accepted Ms. Gillis' offer, and moved to Exelon BSC in mid-January 2001. (TR 396). He held that position until he was terminated on October 26, 2001, and removed from the office four days later. (TR 397-398). During his time at Exelon BSC, Mr. Shirani stated that he made several attempts to return to Exelon Nuclear. (TR 399).

According to Mr. Shirani, he did not speak to Mr. Helwig in person or via telephone, nor did he seek career advice from Mr. Helwig. (TR 403). However, Mr. Shirani did ask Mr. Helwig to mentor him, and explain why he was not selected for certain positions in the merger. (TR 466-467; RX 42). The Complainant said that he invited all of the company executives to a dinner, and all who attended, except Mr. Helwig, shook his hand. (TR 404-405).

Mr. Shirani stated that he had a meeting with Oliver Kingsley on October 6, 2000, during which he gave Mr. Kingsley documents relating

to his GE audit. (TR 406-407). Mr. Shirani further stated that he left this meeting with a positive impression. (TR 407). During the next year, Mr. Shirani wrote a letter to Mr. Kingsley, asking to return to the nuclear division. (*Id.*) Mr. Shirani said that he received no reply from Mr. Kingsley (*Id.*); however, Rich Lundy responded on Mr. Kingsley's behalf, and explained the lack of vacancies and remote possibility of any opportunities. (TR 407-409; CX 28).

On cross examination, Mr. Shirani noted that Mr. Bastyr frequently acknowledged that the Complainant was his best auditor. (TR 434-435). Similarly, after the GE audit, Mr. Shirani became the lead auditor on ComEd's problem vendors, and remained a contributor until he left the department in January 2001. (TR 436, 438).

During the Complainant's time at Exelon BSC, he worked as an auditor under the supervision of both Ms. Gillis and Exelon's contract audit firm, Arthur Anderson. In April 2001, Ms. Gillis hired Ellen Caya to serve as both General Auditor and the point person for restructuring the Internal Audit department. On October 2, 2001, Mr. Shirani received an e-mail from Ellen Caya describing the restructuring process for the Internal Audit department, and explaining that, in order to be considered for any position, he had to apply. (TR 489; RX 4). In this period of restructuring, Mr. Shirani admitted that the only position he applied for was the Principal Audit Manager position. (TR 490; CX 23; RX 35). He believed he was applying for the position

because it had the same title as the position Ms. Gillis hired him for in December 2000. (TR 490-491). The Complainant further stated that he could not apply for any of the higher positions because he did not meet any of the requirements and the salary of the lower job classifications was close to his current salary at that time. (TR 491).

Ross Landsman

Dr. Ross Landsman holds a Ph.D. in civil engineering and has worked as an engineer with the NRC for 23 years. (TR 13-14). He is employed as a Project Engineer in the Decommissioning branch of the Division of Materials and the Region 3 Coordinator for Dry Cask Storage, Dry Field Storage. (TR 14). Dr. Landsman's position includes the task of ensuring that utilities follow the regulations that apply to dry cask storage of spent nuclear fuel. (TR 16). He testified that he met the Complainant years earlier, but most recently in November 2000, at a Holtec users' group meeting. (TR 16-17). According to Dr. Landsman, at that group meeting, Mr. Shirani asked questions regarding some items that remained uncorrected two years after he completed his audit. (TR 17-18).

After the meeting, Dr. Landsman testified that he asked Mr. Shirani for a copy of the audit report and was told he would have to go through official channels. (TR 18). Upon receiving the audit report, Dr. Landsman noted that, based on

the results, U.S. Tool & Die, the subcontractor that built the storage casks for Holtec, were not building the casks according to NRC specifications. (TR 23). He thus called some associates from the NRC's Washington, D.C. office to conduct a vendor audit. (TR 22). However, these people were not interested in the issues presented to them. (TR 30). During subsequent telephone calls with Mr. Shirani, Dr. Landsman learned of an audit of Omni, another subcontractor that did some fabrication for Holtec. (TR 24-25).

Dr. Landsman read the reports and testified that when he asked Mr. Shirani why he did not stop the work, the Complainant responded that he was afraid of losing his job. (TR 25-26). On cross examination, Dr. Landsman stated that when employees have safety concerns, they should report them to their supervisors. (TR 34). If the employees do not get satisfaction from their management, then they should raise the issue with the NRC. (*Id.*)

Walter Hahn

Mr. Walter Hahn is an engineer currently working as a Supply Director at Ontario Power Generation, Ontario, Canada. (TR 139). He was employed by Commonwealth Edison from October 1994, until December 2000, during which time he held multiple positions. (*Id.*) Mr. Hahn reported to Tom Joyce; Mr. Joyce's process for employee performance reviews, including an annual meeting with his direct

reports, during which they would discuss employees' grade levels, merit pay increases, and promotions. (TR 141). According to Mr. Hahn, Russell Bastyr praised the work of Mr. Shirani, stating that Mr. Shirani was his best auditor. (TR 142). Mr. Hahn testified that Mr. Bastyr recommended Mr. Shirani be promoted to a higher level, but Mr. Joyce replied that such a promotion would not be accepted. (*Id.*)

Ann Harris

Ms. Ann Harris is currently unemployed, and her last full-time employment was with the Tennessee Valley Authority ("TVA"). (TR 145). Ms. Harris began working for the TVA as a Clerk at the Watts Bar Nuclear Plant in 1982, and worked her way up to Engineering Aid in electrical engineering in 1984. (TR 146-147). From 1986 until 1988, she served as Assistant Unit Supervisor for electrical engineering; during that time she was on a team that reviewed complaints regarding plant safety. (TR 148-149). Of the approximately 8,000 complaints received, about 2,300 dealt with "managements tactics." (TR 149). Beginning in late 1986, and continuing off and on, Ms. Harris worked on a team called "Corrective Action for Employee Concerns," which was designed to deal with some of these employee concerns. (TR 150).

Ms. Harris testified that her work environment had grown to be unfriendly. (TR 154-155). During mid-1990, she met Oliver Kingsley, TVA's President for Nuclear Power, in the hallway of

the records building; they had a conversation, after which he invited her to Chattanooga, Tennessee, to discuss her concerns in more detail. (TR 155). Ms. Harris subsequently went to Chattanooga and spoke with Mr. Kingsley about issues that needed to be addressed. (TR 156). As a result, Ms. Harris had a series of meetings with representatives from the Human Resources department, including a top personnel official and the head of employee concerns for Watts Bar, ultimately reaching a settlement agreement of both her complaints and substantive issues at the plant. (TR 157-158).

According to Ms. Harris, prior to Mr. Kingsley, conditions at the plant were lax, and many believed he was going to improve those conditions. (TR 159). However, the number of complaints grew, employees who raised issues were terminated, and the quality assurance program was rewritten. (TR 164). Ms. Harris left TVA in September 1997. (TR 166).

Kombiz Salehi

Mr. Kombiz Salehi is currently employed by a technology company that manufactures semiconductor devices and as an instructor at the University of Phoenix, in San Jose, California. (TR 284-285). Mr. Salehi testified that he was recruited to ComEd in 1971, directly after receiving his Masters degree, and he was assigned to work as a reactor engineer at a nuclear power station. (TR 285). Subsequent to

that, he worked in the nuclear industry for several employers, including a company he founded, and the NRC. (TR 285-286). He returned to ComEd in 1997, and remained there until he was laid off in mid-1998. (TR 286).

During this second period of employment with ComEd, Mr. Salehi was employed as the Engineering Assurance Group Supervisor. (TR 295). In that capacity, his duties included coordinating the engineering assurance activities of ComEd's six nuclear power stations. (*Id.*) The purpose of this position was to create independent oversight to monitor engineering activities at the nuclear plants. (TR 297). In this capacity, Mr. Salehi met with David Helwig, who was then working at GE Nuclear, regarding a stop work order that resulted from Mr. Shirani's team audit, which was affecting ComEd's operation of its plants. (TR 305-308). According to Mr. Salehi, Mr. Helwig was unhappy about the manner in which the meeting was arranged, and with Mr. Salehi's substantive presentation. (TR 312-314).

When Mr. Helwig joined ComEd, he was employed as a vice president, overseeing engineering. (TR 321). Mr. Salehi then testified that the engineering assurance group was essentially dissolved. (TR 322). For example, in early 1998, the department had a comparable number of assignments to the previous year, but had a reduced number of staff. (*Id.*) Beginning around November 1997, the staff of five was reduced by reassignments and layoffs. (TR 323-

324). The reassignments and layoffs continued through 1998, ending with Mr. Salehi's layoff. (*Id.*)

David Helwig

Mr. David Helwig came to ComEd in 1998 from General Electric, and is currently working for Infrasource Corporation, a subsidiary of Exelon Corporation. (TR 174). During his time as a Vice President at ComEd, he was responsible for all corporate office functions that supported the operating nuclear plants. (TR 176). During that time, he was also responsible for approximately 2,000 employees; however, according to Mr. Helwig, the Complainant was not one of those employees, nor was the witness responsible for the Quality Assurance department. (TR 177-178). Mr. Shirani first came under Mr. Helwig's supervisory chain around June 1999, during an organizational realignment. (TR 178-179; RX 10). Around late-November 2000, Mr. Helwig testified that he became Executive Vice President of ComEd Operations, and no longer had any responsibilities over the nuclear arena or Mr. Shirani. (TR 181-182).

According to Mr. Helwig he never had any direct role or specific input into the Complainant's performance evaluations during the time that Mr. Shirani was in his supervisory chain. (TR 183). Similarly, Mr. Helwig stated that he did not have any role or participation in the 2000 restaffing process with regards to Mr. Shirani. (TR 185). When asked specifically, he also stated

that he never had a discussion with Ms. Gillis about the Complainant, nor did he suggest or direct her to try to convince Mr. Shirani to leave the nuclear division. (TR 186).

Mr. Helwig testified that within the first month after coming to ComEd in 1998, he sought out Mr. Shirani to let him know that there were no feelings of ill will. (TR 186-187). He also noted that subsequent conversations were initiated by Mr. Shirani, who sought the witness out for professional/career advice. (TR 187). In one of these conversations, Mr. Helwig stated that he cautioned the Complainant to carefully consider a potential move to the financial area of the company, based on his limited credentials and experience with such matters. (TR 189). Moreover, he stated that he never asked Ms. Gillis, Ms. Caya, or anyone else not to select the Complainant for any position in Exelon BSC. (TR 192). Likewise, he testified that he was unaware that Mr. Shirani left Exelon BSC until after the fact, and he never asked, suggested, or directed anyone to terminate the Complainant.

The witness then testified about his time with General Electric. During his tenure, there were frequent audits by customers, however only the audit led by Mr. Shirani resulted in a stop work order. (TR 194). Mr. Helwig discussed some of the presentations he made in 1997 regarding quality issues at GE, including some of the same issues reported by Mr. Shirani in the ComEd audit. (TR 194- 204; RX 27, 28). Mr. Helwig also developed a presentation that addressed the

specifics of the ComEd audit and subsequent stop work order. (TR 204-206; RX 29). According to Mr. Helwig, he accepted the findings of Mr. Shirani's audit because many of the problems had already been recognized in-house and were being addressed. (TR 206-212).

On cross-examination, Mr. Helwig acknowledged that he emphatically disagreed with Mr. Shirani at the GE audit exit interview. (TR 227). Thus, when he joined ComEd, Mr. Helwig stated that he sought out the Complainant to make sure there was no ill will. (TR 226).

Eliecer Palacios

Mr. Eliecer Palacios is currently serving as Exelon Corporation's Ethics and Compliance Director, a position he has held since 1998. (TR 590-591). In this position, Mr. Palacios is responsible for developing compliance programs to address areas of risk within the corporation, as well as developing policies for and enforcing the company's code of business conduct. (TR 591). He testified that on September 5, 2001, he had lunch with Mr. Shirani, at which the Complainant raised his concerns regarding some of the requirements for the position in internal auditing. (TR 591-592).

Mr. Palacios stated he talked to several people regarding Mr. Shirani, including Tom Joyce, who stated that nobody wanted to see Mr. Shirani leave the nuclear department. (TR 596). Likewise, he spoke with Jerry Ellis, HR Director

for nuclear, who conveyed the same message that he sent to Mr. Shirani in an e-mail, which stated that due to a workforce reduction, they did not have a position for him in that department. (TR 596-597; RX 32). Mr. Palacios testified that he had contacted Mr. Ellis to find out if any issues of retaliation existed in Mr. Shirani's records. (TR 597). Mr. Palacios also spoke to Ellen Caya, who stated that Mr. Shirani would be considered for any position he applied for, and he would not be eliminated because he did not meet the ten years of experience requirement. (TR 594-595, 602).

Kevin Yessian

Mr. Kevin Yessian is the Vice President of Supply for Exelon GENCO, a position he has held since September 2000. (TR 608). He is responsible for meeting all of the service and materials requirements for Exelon GENCO, including .3 billion in annual purchases. (TR 609). Mr. Yessian testified that, within his first weeks with the company, he met the Complainant. (*Id.*) Approximately one or two months later, Mr. Shirani approached him and indicated an interest in joining the finance organization because he was interested in advancing in the company. (TR 610). Mr. Yessian stated that he advised Mr. Shirani on the different skill sets required between finance and supplier evaluation. (*Id.*) During that conversation, Mr. Yessian also informed Mr. Shirani that if he left, the position would not be filled because the witness intended to reduce the size of the

supplier evaluation group. (TR 611). For approximately two months, Mr. Yessian reported to Mr. Helwig; during that time, neither Mr. Helwig, nor anyone else, ever asked or suggested any particular action against Mr. Shirani. (TR 612).

On cross-examination, Mr. Yessian reiterated that when Mr. Shirani approached him about taking a position with Ms. Gillis, he cautioned the Complainant because of his skills and experience in the nuclear division. (TR 625). Mr. Yessian testified that when he believes a position is not an ideal fit, he does not discourage or encourage employees from seeking opportunities. (TR 626-627). On recrosss, Mr. Yessian stated that he made the decision to downsize the department in October, and told Mr. Shirani in November, however, the witness could not remember when, or if, he told any other employees of his decision. (TR 628-629). Mr. Yessian also stated that he did not tell Mr. Shirani how he intended to downsize. (TR 632-633). Ultimately, most downsizing occurred through attrition, however, one person was removed. (TR 633).

Martha Garza

Ms. Martha Garza is the Human Resources Manager for Exelon BSC, a position she has held since the corporate merger, in October 2000. (TR 634-635). Her responsibilities include internal and external recruiting, performance management, succession planning, and

leadership development. (TR 635). During the fall 2001 restructuring of the Internal Audit department, Ms. Garza provided support for Ms. Caya and was responsible for internally posting jobs, scheduling interviews, and coordinating all activities for a hiring manager. (TR 640).

According to Ms. Garza, Mr. Shirani called her the night before the available positions were posted and expressed concern about his qualifications in relation to the outlined criteria. (TR 641). Ms. Garza stated that she encouraged him to apply and go through the interview process anyway because an interview allows an applicant to market himself and address any shortcomings or other relevant criteria. (TR 641-642). Ms. Garza further testified that she encouraged the Complainant to apply for those jobs he thought he was qualified to do after he asserted that he would not be applying for certain jobs because he did not want to take a reduction in pay or a demotion. (TR 642).

Mr. Garza testified that applicants would be considered for any position they applied for, however, no one was considered for positions to which ~~they~~ did not apply. (TR 642-643). On October 26, 2001, Ms. Garza and Ms. Caya met with Mr. Shirani to inform him that he had not been selected for the only position for which he applied, and that he was consequently eligible for merger severance benefits. (TR 643).

Mr. Shirani subsequently sent an e-mail to several company officials on October 30, 2001

(RX 21), and as a result, Ms. Garza and Ms. Caya immediately arranged a meeting with the Complainant. (TR 645). The meeting occurred later that day, to convince the Complainant to transition his work to other members of the Internal Audit department. (TR 646). Ms. Garza testified that Mr. Shirani became "belligerent and confrontational," and refused to leave; ultimately, Ms. Caya called security to remove him. (TR 647). Immediately after the meeting, Ms. Garza prepared notes to reflect the events of the meeting. (TR 645-646, RX 22). Ms. Garza testified that she was unaware of Mr. Shirani's work or activities during his tenure in the nuclear division and no one directed, suggested, or asked her to fire the Complainant. (TR 648).

Ms. Garza noted that prior to the reorganization, Mr. Shirani was in the E-4 pay band, earning an annual salary of approximately $97,000. (TR 662; CX 19). As such, he was around the middle of the new E-4 pay band, with a maximum annual salary potential of $126,000. (TR 662, RX 20). Thus, Mr. Shirani would have been going from a higher pay band to a lower one, had he applied for the E-3 position of Senior Auditor. (TR 662). Similarly, had the Complainant applied for the E-3 position, he would have already been close to the maximum salary for the E-3 pay band. (TR 662-663).

Ruth Ann Gillis

Ms. Ruth Ann Gillis is the President of Exelon BSC and a Senior Vice President of Exelon

Corporation. (TR 664). Ms. Gillis first testified about the company's structure, Exelon's various entities and subsidiaries, and her positions with Exelon and previously Unicom. (TR 664-666). She noted that during her time as Chief Financial Officer of Exelon Corporation, her responsibilities included financing, cash management, managing the internal reporting of financial results, tax, internal audits, and financial risk management. (TR 666).

The witness testified that she first met Mr. Shirani when she served as the executive sponsor for an employee network group affiliated with the Asian American ComEd Society, which later became Asian American Community under Exelon ("AACES"). (TR 667-668). Mr. Shirani was the first President of AACES. (TR 668). According to Ms. Gillis, she typically spoke with the Complainant twice per month, generally about AACES business; however, they often discussed Mr. Shirani's position in the company. (*Id.*) During one particular encounter at an AACES event called "Taste of Asia", Ms. Gillis stated that Mr. Shirani told her he was disappointed and frustrated that he was not receiving what he felt to be adequate and appropriate recognition for his expertise and experience. (TR 669). Ms. Gillis further stated that she advised him to be very clear about his goals regarding his career and addressed his interest in being a manager. (TR 670). She also recommended that the Complainant consider how much time he spent as President of AACES, which was a volunteer

position and not directly job related. (TR 670-671).

Ms. Gillis noted that, prior to leaving the nuclear division, Mr. Shirani complained about the lack of recognition, lack of promotion, and lack of opportunities to take on a managerial role. (TR 672-673). Similarly, the Complainant wanted to do what was best for Exelon. (TR 673). According to Ms. Gillis, at no time did Mr. Shirani tell her that the nuclear division was trying to force him out. (*Id.*) However, Mr. Shirani sent an e-mail to Ms. Gillis, which she interpreted as a request for help in getting a job. (TR 674; RX 8). Subsequently, during the time of the merger, in autumn 2000, Ms. Gillis testified that she met with Mr. Shirani, and he asked her for a job in the finance organization, hoping for more opportunities to realize his goals and contribute more to the company. (TR 675). Ms. Gillis stated that she was initially unsure because she did not see a correlation between her department and the Complainant's experience, but she informed him that she would consider his request. (TR 676).

At the meeting with Mr. Shirani, Ms. Gillis testified that she described the status of her division, including that she was hiring a general auditor, who would be responsible for rebuilding the internal audit area. (TR 677). Ms. Gillis also testified that she worked with Human Resources to see if she could develop an opportunity to meet Mr. Shirani's objectives. (TR 679). The witness noted that she never suggested the

position of Tax Manager because tax is such a specialized area and the Complainant did not have the necessary background; however, she continued to look for or create a position for him because she appreciated his interest and passion for wanting to improve his career while supporting the company. (TR 679-680).

According to Ms. Gillis, she offered Mr. Shirani a position in December 2000, shortly before she left for vacation. (TR 680-681). While the internal audit department was not yet formed, she proposed that he could work with Arthur Anderson through the development phase. (TR 681). After some discussion about the compensation package, Mr. Shirani communicated his acceptance of the offer to Ms. Gillis while she was on vacation. (TR 685).

Ms. Gillis testified that the Complainant informed her that he had applied for the position of Diversity Manager; thus she knew of his interest in that position. (TR 685-686). However, she learned from Human Resources that, although Mr. Shirani had applied, contrary to his belief, he was not the leading candidate; in fact, the company had not yet narrowed the field of candidates and was still interviewing. (TR 686). Ms. Gillis stated that she never told the Complainant that Mr. Kingley did not support diversity. (TR 688). Moreover, Ms. Gillis testified that she had no knowledge or any reason to believe that anyone in the nuclear division was attempting to get rid of Mr. Shirani; she stated

that she never spoke with anyone in the nuclear division about his job. (*Id.*)

During the Complainant's first few months on the job, Ms. Gillis stated that she received feedback from Arthur Anderson, in which his supervisors expressed concerns with his understanding of his responsibilities and his giving unsolicited advice to audited clients. (TR 690). Ms. Gillis said that she suggested he be more sensitive to his clients' needs and receptivity towards advice. (TR 691). Otherwise, Ms. Gillis found that Mr. Shirani was on course and progressing in the job. (*Id.*)

In April 2001, Ms. Gillis hired Ellen Caya as the General Auditor to create the internal audit strategy and develop the organizational structure of the department. (TR 693). Ms. Gillis noted that she did not direct or suggest to Ms. Caya who should fill any of the manager positions. (TR 695). Specifically, she stated that she did not direct or suggest that Ms. Caya not hire Mr. Shirani for that position. (TR 696). Likewise, Ms. Gillis said that she had no role in the decision to terminate Mr. Shirani. (*Id.*) According to Ms. Gillis, the protocol for terminating employees who had either bid on jobs and not been selected or not bid on positions was a part of a process, overseen by Ms. Caya. (*Id.*) Ms. Gillis testified that while she knows Mr. Helwig, Mr. Kinglsey and Mr. Yessian, none of them, or anyone else in the nuclear department, directed, suggested or asked her to

take any action regarding the Complainant. (TR 696-697).

On cross-examination, Ms. Gillis stated that she did not make any promises about Mr. Shirani becoming a manager, nor did she discuss the stress level of the job with him. (TR 720). Moreover, she was unable to provide the Complainant with a job description or a reporting chain of command, and she could not have a managerial relationship with him because of the rest of her responsibilities. (TR 720-721). Finally, Ms. Gillis testified that she was unaware of Mr. Shirani's reputation in the company, including any derogatory nickname that referred to a penchant for shutting down facilities. (TR 722).

Ellen Dee Caya

Ms. Ellen Caya was hired by Exelon on April 23, 2001, and currently serves as Vice President of Internal Audit with Exelon BSC. (TR 524). Prior to her promotion in January 2002, she was employed as the Director of Internal Audit; in that capacity her responsibilities included defining the strategic direction and implementing a strategic plan for the department. (TR 524-525). When she was hired by Exelon, she had six people in Philadelphia, and Mr. Shirani in Chicago, who reported to her; she reported directly to Ruth Ann Gillis. (TR 525-526). According to Ms. Caya, Mr. Shirani's duties as a Principal Auditor were to complete part of the audit plan, financial operation work,

compliance audits, and generally be part of the audit team. (TR 526). None of the department's work involved nuclear safety audits. (TR 527).

Overall, Ms. Caya opined that Mr. Shirani did a good job in his Internal Audit position. (TR 528). In his first work appraisal, Ms. Caya noted that the Complainant needed to increase his financial skills. (RX 1). She explained that he had not had much experience in this area, and if he wanted to continue his growth in the audit department and overall career development, he would need experience completing different types of audits. (TR 532). Also during this appraisal, Ms. Caya indicated that Mr. Shirani had difficulty staying focused on the issues and his listening skills needed improvement. (TR 535; RX 1).

Approximately July or August 2001, Ms. Caya began developing her proposal for the Internal Audit department, which recommended developing the department in-house in both Philadelphia and Chicago, and staffing it according to needed skill sets and the changing business environment. (TR 538). To staff the redesigned positions, Ms. Caya stated that she used an internal process used by every department that had gone through a "deselection-selection process" as a result of the merger. (TR 541). She drafted job descriptions for each position and posted them on the internal Human Resources placement system. (*Id.*) On October 2, 2001, Ms. Caya sent an e-mail to her employees regarding the Internal Audit department's restructuring plan. (RX 4).

On cross-examination, she added that under a "deselection-selection" process, every individual had to reapply for his or her position. (TR 583).

According to Ms. Caya, between his July evaluation and the October 2 e-mail, Mr. Shirani spoke with her several times and expressed his interest in a manager position. (TR 543). Ms. Caya stated that she told him that he should apply for the position of Senior Auditor because it was unlikely he would be selected as a manager. (*Id.*) She then stated that he rejected her suggestion of the Senior Auditor position because the salary was not high enough. (TR 544).

Ms. Caya noted that the deadline for submitting applications was October 16, 2001. (*Id.*) A person could not be considered for a position to which he or she did not apply. (TR 544-545). Positions that remained open after the internal process was completed would be assessed and filled externally. (RX 4). For the position of Principal Audit Manager, Ms. Caya explained that a manager candidate had to have supervisory experience; likewise, those chosen needed to have "a full depth and breadth of auditing," including experience in financial, operational and compliance auditing. (TR 546-547). However, not all of the position requirements listed in the posting were absolute prerequisites to be selected because an applicant would be evaluated on experience and ability. (TR 547; RX 5). "Core competencies," such as

those listed as technical and enabling competencies, were required. (TR 548; RX 2,5).

Ms. Caya testified that she was the sole decision-maker in determining the manager's job duties. (TR 548). Similarly, she stated that she was the sole decision-maker is selecting a manager. (*Id.*) Ms. Caya said that neither Ms. Gillis, nor anyone else, ever directed, suggested or asked her to put a particular person in the manager's position. (TR 548-549). Likewise, Ms. Caya further noted that no one ever directed, suggested or asked her not to select Mr. Shirani as a manager. (TR 549).

After Mr. Shirani's interview on October 22, 2001, Ms. Caya stated that she completed a candidate assessment form. (*Id.*; RX 6). According to Ms. Caya, she again explained to Mr. Shirani that it was unlikely he would get the manager's position; she also inquired as to why he had not applied for the position of Senior Auditor. (TR 551). Allegedly, Mr. Shirani responded that the salary was not high enough. (*Id.*) In both her notes and her testimony, Ms Caya explained that she did not select Mr. Shirani for the manager position for several reasons, including his: Limited financial and compliance auditing experience; limited supervisory experience, which was not recent; strong verbal communication skills, but improvement needed on his written communication skills; tendency to be confrontational; and failure to explain why he

met the required competencies. (TR 552-556; RX 6).

Ultimately, Darren Zurowski and Marcos Kushkov were chosen for the manager positions. (TR 556). According to Ms. Caya, Mr. Zurowski had his MBA, was a CPA and a CIA, and had 11 years of experience in public and private accounting, including directing work at ComEd, and years of experience with several utilities in Chicago. (TR 556-557). He also had supervisory experience, leading employees at Arthur Anderson. (TR 557). Mr. Kushkov was a CPA, also with both public and private auditing experience, experience in financial, operational and compliance auditing, as well as some supervisory experience. (*Id.*)

Ms. Caya stated that she and Ms. Garza met with the Complainant on October 26, 2001, to inform him that he was not selected as a manager. (TR 561). Ms. Caya further stated that the decision to terminate Mr. Shirani was hers; again she noted that no one, including Ms. Gillis, ever asked, suggested or directed her to terminate Mr. Shirani. (TR 561-562). Ms. Caya and Ms. Garza again met with Mr. Shirani on October 30, 2001. (TR 562). Ms. Caya testified that, after she repeated the job criteria and the correlation to Mr. Shirani's experience, he became upset and vocal, "ranting and raving" about a conspiracy against him. (TR 562-563). Ms. Caya said that she believed that Mr. Shirani was getting very angry, which concerned her, so

she left the meeting and called security. (TR 563).

With regard to the position of Senior Staff Auditor, there were 11 openings in Chicago, one of which was filled, and 5 slots available in Philadelphia, two of which were filled in this internal selection process. (TR 559). After this selection process concluded, there were three incumbents in Philadelphia who were not selected for their positions. (TR 560). According to Ms. Caya, they were not considered for any positions for which they did not apply, and they were offered the same separation package offered to Mr. Shirani. (*Id.*)

Ms. Caya concluded her direct testimony by noting that Mr. Shirani had previously told her he had done an audit of GE and it was not favorably received. (TR 564-565). However, according to Ms. Caya, she has never spoken to Russ Bastyr, David Helwig, Oliver Kingsley, or anyone else in Exelon Nuclear about Mr. Shirani and none of those individuals directed, suggested or asked her to take any particular action with respect to Mr. Shirani. (TR 563-564).

Russell Bastyr

Mr. Russell Bastyr is the Supplier Evaluation Services Manager for Exelon GENCO, Nuclear Division, and is responsible for supervising a group of auditors to oversee suppliers of safety related products for the nuclear division. (TR 735-736). He first explained that the Employee

Concerns Program began because employees at the Braidwood Generating Station did not have the opportunity to raise issues, particularly during their employment, or they feared losing their jobs for raising safety issues. (TR 737). ComEd thus created the program to allow employees to identify nuclear safety issues at that site without fear of retaliation or retribution. (TR 737-738). Through advertising campaigns, Mr. Bastyr stated that the company has encouraged employees to raise nuclear or safety concerns. (TR 739).

Mr. Bastyr testified that he first supervised the Complainant in September 1997; the witness took the job over for Paul Zurowski, who later returned and worked for Mr. Bastyr in 1998. (*Id.*) In June 1999, under the direction of new management, ComEd underwent a realignment, during which everyone had to reapply for their jobs. (*Id.*) The purpose of Supplier Evaluation Services ("SES") is to contact suppliers and, through an audit and annual evaluations, verify that their quality assurance program meets NRC requirements under 10 C.F.R. 50. (TR 742). The purpose of the audits is to identify problems with suppliers' programs, verify with reasonable assurances that proper parts are being used, and ensure that the parts meet their safety standards and will perform as intended. (TR 743). Mr. Shirani's duties, according to Mr. Bastyr, included performing audits, participating as a member on some and leading others, planning audits, visiting vendor sites, and

looking for technical specialists to join him on the audits. (*Id.*) When the Complainant lead an audit, Mr. Bastyr's role was to review the audit, approve the audit plan, approve the actual audit, approve corrective actions, and generally supervise Mr. Shirani. (TR 744). Mr. Bastyr was held personally responsible for the quality of his auditors' work. (*Id.*)

When a vendor had significant problems, Mr. Bastyr, as a manager, could issue a stop work order if the auditors found the general process, or continuing the work, would have a detrimental impact the final product, or if the quality assurance program was not indicating that a part would perform as designed. (TR 746-747). Since September 1997, Mr. Bastyr estimated that the department has averaged 15-16 audits per year; during that time, most audits yielded formal findings, but only one stop work order had been issued. (TR 748-749). Mr. Bastyr stated that the person who wrote the audit recommending the stop work order remained an auditor with Exelon Generation Company until late-1999 or early-2000, when he sought an opportunity to move closer to his home. (TR 750-751).

According to Mr. Bastyr, the Complainant was one of his top performing auditors, particularly because of his technical knowledge and thoroughness. (TR 755-756). The witness noted that he gave Mr. Shirani the highest rating that he gave any employee for 1999. (TR 757; RX 12). He further noted that he enrolled Mr. Shirani

into "Situation Development," a course designed to teach techniques in supervising employees with different levels of experience. (TR 758). In 2000, Mr. Shirani's rating from Mr. Bastyr was lower, particularly in the areas of personal drive and integrity/trust. (TR 760-761; RX 13). According to Mr. Bastyr, the lower rating reflected that the Complainant was out of the office without informing Mr. Bastyr where he was going, which could have been problematic if he was needed. (TR 761). Likewise, in Mr. Bastyr's opinion, Mr. Shirani focused too heavily on self-promotion, rather than the needs of the group, and his performance suffered. (*Id.*)

After the merger, Mr. Bastyr was selected as SES Manager for Exelon GENCO, Nuclear Division. (TR 763). During the merger staffing process, Mr. Bastyr stated that he nominated Mr. Shirani for his own position, nuclear oversight, and he spoke with "people" about a possible supervisory position in engineering. (TR 764). Contrary to Mr. Shirani's request for two nominations for positions outside of nuclear, Mr. Bastyr did not nominate him for any such positions. (TR 767-768; CX 31). Mr. Bastyr explained that he nominated the Complainant for positions internally to the nuclear division because it is a specialized field and requires people with special training and skills. (TR 768, 812). Similarly, he believed that Mr. Shirani's experience made him a better candidate for positions in the nuclear division, and he added value and best served the company in that arena. (TR 768).

Mr. Bastyr stated that he made selection decisions for auditors under his position during the restaffing process; he selected Mr. Shirani to remain an auditor, while he rejected other candidates. (TR 768-771). Through the process, Mr. Bastyr met with Mr. Shirani a few times. On one occasion, Mr. Shirani stated that he would stay on as an auditor if that was the only job available. (TR 769). On a subsequent occasion, however, Mr. Shirani expressed dissatisfaction with his lack of advancement, and asked for a voluntary separation package, which, as Mr. Bastyr explained, was not allowed. (TR 769-770). Mr. Bastyr testified that he subsequently helped Mr. Shirani apply for two positions outside of the division: Diversity Manager and a position in Ms. Gillis' financial organization. (TR 771-773).

According to Mr. Bastyr, no one, including David Helwig or Tom Joyce, ever directed or asked him to convince Mr. Shirani to leave the nuclear division. (TR 774). Similarly, the witness testified that he never had a conversation with either Ms. Gillis or Ms. Caya about Mr. Shirani. (TR 774-775). Mr. Bastyr discussed several audits Mr. Shirani had either led or been a member of, including the Holtec/U.S. Tool and Die and GE audits. He stated that he never requested, nor had anyone asked him to request, Mr. Shirani alter his findings. According to Mr. Bastyr, Mr. Shirani's performance on his follow-up audit of GE was thorough, and a result, Mr. Bastyr opined that the follow-up audit revealed that the

1997 audit improved GE's performance. (TR 786).

Mr. Bastyr testified that in 2001, he had a conversation with his supervisor, Kevin Yessian, who said that Mr. Shirani was interested in returning to the nuclear department. (TR 787). The witness stated that he replied that he was willing to have Mr. Shirani return, however, he had a full staff, and Mr. Yessian acknowledged that they could not go over budget by hiring another person. (*Id.*) Mr. Bastyr also said that, hypothetically, if the opportunity arose and budgetary constraints were not an issue, he would need Mr. Shirani's abilities back, but he would not explicitly state that he would want the Complainant to return. (TR 819-820).

Mr. Bastyr noted that during the Complainant's time in the nuclear division, he had given Mr. Shirani and one other employee "signature authority", the power to review and sign documents, usually completed by Mr. Bastyr, in his absence. (TR 788). The witness concluded by stating that he trusted Mr. Shirani to exercise this authority and because the Complainant had proven that he had risen to that level of responsibility. (*Id.*) On cross examination, however, when pressed about the "C" he gave to Mr. Shirani for trust and integrity, Mr. Bastyr stated that he trusted Mr. Shirani to sign certain documents, but the rating dealt with total performance over the course of the year. (TR 795-796).

Applicable Law

Any employer who "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates against any employee because the employee has: (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in 24.1(a)..." is deemed to have violated federal law and the regulations.[2]

"Under the Energy Reorganization Act of 1974, any complaint shall be filed within 180 days after the occurrence of the alleged violation."[3]

Elements and Burden of Proof

In a case involving an environmental whistleblower, the complainant has the burden of proof to make a *prima facie* showing that: (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; (3) the respondent was aware of the protected activity when it took the adverse action; and (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action.[4]

If a complainant successfully establishes a *prima facie* case, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action, in order to rebut the complainant's showing.[5] The respondent bears only the burden of production of rebuttal

evidence.[6] The complainant may then counter the respondent's evidence by proving, by a preponderance of the evidence, that the respondent's reasons are not the true reasons for the adverse action, but rather, a pretext for discrimination.[7] Likewise, at all times, the complainant bears the burden of demonstrating, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity, in violation of the law.[8]

Discussion

Mr. Shirani testified that he made an oral complaint to the Department of Labor on February 1, 2002. (TR 500). He also noted that he signed a written complaint on February 27, 2002. (TR 501). The written complaint was then submitted to the Department of Labor on February 28, 2002, and received on March 5, 2002. (RX 44). After conducting an investigation, OSHA determined that the case should be dismissed, finding that the evidence did not support the Complainant's claims. The Complainant appealed to this Court for adjudication of his claim.

Protected Activity

As noted above, the first element a complainant must prove is that he engaged in protected activity. Mr. Shirani alleged that he engaged in protected activity by his communications with the Nuclear Regulatory Commission, including a complaint on November 1, 2001, and

conversations with the NRC's Ross Landsman, such as a discussion on January 19, 2001. (TR 503). Moreover, the Complainant also noted that Mr. Landsman ultimately received a copy of one of his audit reports. The Respondent has not contested that the Complainant engaged in protected activity. After reviewing all of the facts, I find that the Complainant engaged in protected activity, and established the first element of a *prima facie* case.

Adverse Action

The second requirement for a case of retaliation requires adverse action by the respondent. There are two potential adverse actions to be considered in the instant matter. First, Mr. Shirani was not chosen for the position of Principal Audit Manager. Subsequently, Mr. Shirani's employment with Exelon was terminated. Thus, I will consider the Respondents' failure to hire the Complainant, and his eventual termination, as separate potential adverse actions.

Failure to Hire

When determining whether a complainant has established an actionable adverse action in a failure to hire case, the framework of a *prima facie* case outlined in *McDonnell Douglas Corp. v. Green* applies.[9] In order to establish a *prima facie* showing of discriminatory refusal to hire, the complainant must show that: (1) he applied and was qualified for a job for which the

employer was seeking applicants; (2) despite his qualifications, he was rejected; and (3) after his rejection, the position remained open and his employer continued to seek applicants from persons with the complainant's qualifications.[10]

In the present case, the Complainant applied for the position of Principal Audit Manager, which was in the E-4 pay band under Ms. Caya's restructuring plan for the Internal Audit department. Ms. Garza testified that she encouraged the Complainant to apply for all the positions for which he believed he has was qualified. (TR 642). Ms. Caya likewise testified that, during several conversations with Mr. Shirani, she encouraged him to apply for the position of Senior Auditor because it was unlikely that he would be hired to fill a manager-level position. (TR 543, 551). Moreover, according to Mr. Palacios, the Complainant raised some concerns about his qualifications for positions within the Internal Audit department. (TR 591-592). Finally, Ms. Caya explained that she wanted someone with well-rounded experience in all facets of auditing, plus supervisory experience, to serve as Principal Audit Manager. (TR 546-547). According to her, Mr. Shirani did not meet those criteria; therefore, he was not chosen for the position. (TR 552-556). Thus, while Exelon BSC's Internal Audit department was seeking applications from all employees under the restructuring plan, and the Complainant applied for the job of Principal Audit Manager, the evidence does not establish

that the Complainant was qualified for that position.

Regarding the second prong of the discriminatory refusal to hire test, Ms. Caya noted that some job criteria were not absolute prerequisites, however other competencies were required. (TR 547-548). As noted above, she determined that Mr. Shirani was not qualified. Based on that determination, he was thus rejected for the position he sought.

Finally, according to Ms. Caya's restructuring plan, all of the positions were open and employees were required to submit applications to be considered for a position. Ms. Caya drafted job descriptions and posted them on the internal Human Resources placement system via e-mail, dated October 2, 2001. (TR 541; RX 4). The posting noted that applications were due by October 16, 2001. (RX 4). The e-mail noted that positions left vacant would be assessed before filling them externally. (*Id.*) The posting had a finite time, and two individuals were selected to fill the Principal Audit Manager position. Ms. Caya testified that the individuals chosen met the required competencies, had stronger educational backgrounds and more practical experience than the Complainant, and had recent experience supervising employees. (TR 551-556).

The Respondents have not addressed the issue of adverse action against the Complainant by failing to hire him for the position of Principal

Audit Manager. However, after reviewing the facts, I find that the Respondents did not take adverse action against the Complainant because, although he applied for a position posted by the Respondents, he was not qualified. Moreover, while he was rejected for the position, the Respondents did not continue seeking applicants; rather, the Respondents hired two people with greater qualifications. Thus, the Complainant is not able to establish adverse action by the Respondents' failure to hire him.

Termination of Employment

Mr. Shirani alleged that he was terminated by the Respondents. Such action would constitute an adverse action. The Respondents have not contested that it took adverse action against the Complainant. After reviewing the facts, I find that the Respondents did take adverse action against the Complainant by terminating his employment. The Complainant has thus established the second element of a *prima facie* case.

Respondents' Knowledge of Protected Activity

A complainant must demonstrate that one or more of the respondent's employees, who had input in the hiring decisions, had knowledge of the complainant's protected activity during the relevant time period.[11] Mr. Shirani and Mr. Bastyr discussed the release of the Holtec audit, pursuant to Mr. Landsman's request, during the

time when the Complainant worked in Mr. Bastyr's department. The Complainant ultimately left the nuclear department, and Mr. Bastyr's supervision, when he was hired to join Exelon BSC. Ms. Gillis, who hired Mr. Shirani for a position with Exelon BSC, stated that she knew Mr. Bastyr, and other executives in the nuclear division, such as Mr. Helwig and Mr. Kingsley. (TR 696-697). She further stated, however, that none of them asked or told her to take any particular action regarding Mr. Shirani. (*Id.*) In addition, she said that she was unaware of the Complainant's reputation in the nuclear department. (TR 722).

Initially, Mr. Shirani dealt with Ms. Gillis and supervisors at Arthur Anderson. In April 2001, Ms. Gillis hired Ms. Caya to oversee and organize the Internal Audit department's restructuring. (TR 693). Ms. Caya noted that she was solely responsible for selecting a department manager, and Ms. Gillis did not attempt to influence her decision. (TR 548-549). While Ms. Caya testified that she knew Mr. Shirani had audited GE while in the nuclear department, and that the audit was not favorably received, she stated that she has never spoken to Mr. Bastyr, Mr. Helwig, Mr. Kingsley, or anyone else in Exelon Nuclear. (TR 563-565). Additionally, she said that none of those individuals asked or told her to take any action regarding Mr. Shirani. (*Id.*)

Officials in Exelon Nuclear, such as Mr. Bastyr, knew of the Complainant's protected activity.

However, Mr. Shirani had since moved to Exelon BSC. The Complainant has not proven that anyone from Exelon or Exelon GENCO ever asked, suggested or directed anyone in Exelon BSC to take any action regarding Mr. Shirani's employment. Rather, Ms. Caya noted that she had sole responsibility for restructuring the Internal Audit department, and she never communicated with the Complainant's former supervisors in Exelon Nuclear.

After reviewing the evidence, I find that the Claimant has failed to prove that the Respondents' employees who had input into the hiring decision in October 2001 had knowledge of his protected activity. Thus, the Claimant has failed to establish the third element of a *prima facie* case.

Nexus of Protected Activity and Adverse Action

Finally, a complainant must show that the protected activity was the likely reason for the adverse action. I previously found that the Respondents' termination of the Complainant was an adverse action. However, the Complainant failed to establish the Respondents' knowledge of his protected activity, the third prong of a *prima facie* case. Despite this shortcoming, I will consider the evidence of a nexus between Mr. Shirani's protected activity and the Respondents' adverse action.

The Complainant examined his protected activity in great detail, but discussed only briefly a relationship to the adverse action taken by the Respondents. The Claimant's closing brief suggested that Mr. Shirani was targeted for removal for several years, because of certain activities (*i.e.* his audits), which occurred years before Ms. Caya's arrival. However, the Claimant gave only cursory treatment to Ms. Caya's employment decisions, and instead attacked her credibility for her testimony. In his reply brief, Complainant simply stated that "Caya's action was a pretext for discrimination with roots traced back to 1997 when Shirani wrote the GENE special audit findings and amplified when he wrote the nine findings in the 2000 Holtec/U.S. Toll & Die audit." (Complainant's Reply [Closing] Brief, at 5)(citation omitted).

Rather than address the adverse action of termination, the Complainant charged the Respondents with carrying out a long and detailed conspiracy against him. Specifically, the Complainant argued that Ms. Gillis lured him to Exelon BSC to remove him from the nuclear operations. The Respondents challenged this assertion by claiming the Mr. Shirani sought assistance from Ms. Gillis in securing a position outside of Exelon Nuclear.

I have carefully considered and reviewed the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative

and available evidence, analyzing and assessing its cumulative impact on the record.[12]

Based on the unique advantage of having heard the testimony firsthand, I observed the behavior and demeanor of the witnesses. To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses. After reviewing the criteria for credibility, and listening to Ms. Gillis' testimony at length, I find Ms. Gillis to be a highly credible witness and her testimony compelling. Moreover, Ms. Gillis' testimony is supported by the evidence in the record.

Ms. Gillis testified that Mr. Shirani expressed his disappointment and dissatisfaction in a lack of recognition in the nuclear division. (TR 669). Ms. Gillis noted that she gave the Complainant job advice (TR 670); ultimately, she stated that Mr. Shirani asked her for a position in Exelon BSC. (TR675). Ms. Gillis was not the only witness to testify that the Complainant expressed frustration with his current position. Mr. Bastyr stated that Mr. Shirani complained about his lack of advancement in the nuclear division and had requested a voluntary separation package. (TR 769-770). The Complainant provided no evidence to support his claims of being lured to Exelon BSC, nor did he refute his alleged frustration with the lack of advancement in Exelon Nuclear. Thus, I find that the

Complainant sought opportunities in the company, including the move to Exelon BSC.

Ms. Gillis also testified that no one from Exelon's nuclear division asked, suggested or directed her to take any action regarding Mr. Shirani's employment with the corporation. (TR 696-697). She also stated that she explained to the Complainant that she was in the process of hiring a General Auditor to rebuild the Internal Audit department (TR 677), which she subsequently did in April 2001, when she hired Ms. Caya. (TR 693). Ms. Gillis said that Ms. Caya was going to have the responsibility to reorganize the department and she did not have any part in the decision to hire or terminate Mr. Shirani. (TR 696).

Ms. Caya told a similar story. According to her, she was hired in April 2001, and during that summer, she developed her restructuring plan, including the method of hiring staff for the redesigned positions. (TR 538-541). In October, she released her plan via e-mail to her subordinates, including Mr. Shirani. (RX 4). Ms. Gillis, Ms. Caya and Ms. Garza each explained that under the type of staffing process used by Ms. Caya, an employee had to apply for each position sought. (TR 696, 544-545, 642-643, respectively).

During this process, the Complainant applied for one position. Ms. Garza and Ms. Caya both stated that they cautioned him to apply for each position for which he thought he was qualified.

Each testified that Mr. Shirani was not interested in applying for a lower position because of the limited earning potential of the E-3 pay band in relation to his current salary. Likewise, Mr. Shirani stated that he did not apply for other positions because he did not feel he was qualified for the higher positions and he avoided the lower job classification because the maximum salary was close to his current salary. (TR 491). He further noted that he applied for the Principal Audit Manager position because it had the same title as the position he held when hired by Ms. Gillis. (TR 490-491).

Ms. Caya stated that she alone made the decision not to hire Mr. Shirani for the manager role because he lacked qualifications that she deemed to be essential. (TR 548, 552-556). Mr. Shirani had not applied for any other position. Pursuant to the selection process guidelines described above, as explained by Ms. Gillis, Ms. Caya and Ms. Garza, the Complainant was not eligible to be considered for any other position, and was terminated. The Complainant suffered the same fate as three other similarly situated employees. Each incumbent had applied for a position or positions and was not selected; thus, each employee was terminated and eligible for the same separation package as the others. (TR 560).

The Complainant claimed that Ms. Caya's decision was part of a conspiracy, however, he offered no evidence to refute her testimony that she made this employment decision on her own.

Moreover, the Complainant acknowledged that he only applied for one position. Since he was not chosen, his employment with Exelon was terminated. None of the evidence of his termination indicates any connection to his protected activity while employed in the nuclear division. Thus, the Complainant has failed to establish a nexus between his protected activity and the Respondents' adverse action. Therefore, he has not established the fourth element of a *prima facie* case.

Respondents' Legitimate, Non-discriminatory Reason

Assuming *arguendo* that the Complainant had established all four elements of a *prima facie* case, the Respondents would be required to produce evidence of a legitimate, nondiscriminatory reason for the adverse action, in order to rebut the Complainant's showing.[13] The Respondents bear only the burden of production of rebuttal evidence.[14]

In their closing brief, the Respondents alleged that the sole reason for Complainant's termination was that he was not selected for the Principal Audit Manager position, the only position for which he applied. (Respondents' Post-hearing Brief, at 21). They further alleged that he had notice that it was unlikely that he would be hired in that capacity, and he should have applied for a position in the E-3 pay band, such as Senior Auditor. (*Id.* at 22). This allegation was based on Ms. Caya's testimony

that she had previously told the Complainant that it was unlikely he would be hired for the manager's position and he needed to apply for other positions. (TR 543).

Ms. Caya was responsible for crafting the department's restructuring plan and writing the job descriptions for the various positions. In filling the position of manager, she stated that she wanted someone with a "full depth and breadth of auditing" experience, including a background in the three types of auditing done by her department. In addition, she was looking for someone with supervisory experience. In her testimony, Ms. Caya noted that Mr. Shirani did not have experience in all of the different types of audits, nor did he have supervisory experience in the financial section.

The two individuals ultimately chosen for the manager positions had years of auditing experience, as well as supervisory experience. Their credentials appear to be consistent with Ms. Caya's requisite competencies, and superior to the Complainant's qualifications. The Complainant only applied for the position of manager and was not chosen. As a result of this selection process, and pursuant to the process guidelines, Mr. Shirani was terminated.

Mr. Shirani was terminated in accordance with the restructuring process rules, and as such, was treated the same as similarly situated employees. After reviewing the evidence, I find that the Respondents have produced evidence of

a legitimate, nondiscriminatory reason for terminating the Complainant's employment.

The Respondents have demonstrated a legitimate, nondiscriminatory reason for their adverse action toward the Complainant, and thus, met their burden. The Complainant must now show, by a preponderance of the evidence, that the Respondents' reasons are not the true reasons for the adverse action, but rather, a pretext for discrimination.[15]

The Complainant offered no evidence to explain why he was better qualified for one of the manager positions, or why he should have been hired over those chosen. Nor has the Complainant offered any evidence to explain why he should not have been terminated after he was not chosen for the only position for which he applied. Finally, the Complainant asserted that Ms. Caya's action was a pretext for discrimination, however he failed to offer any evidence to support this allegation. The Complainant has thus failed to show, by a preponderance of the evidence, that the Respondents' reasons for the adverse action were a pretext for discrimination.

Conclusion

The Complainant engaged in protected activity while employed with the Respondents. The Respondents did not take adverse action against the Complainant when they did not select him as the Principal Audit Manager because he was

not qualified and the Respondents did not continue seeking applications from similarly qualified candidates. Based on the evidence, however, the Respondents took adverse action against the Complainant by terminating his employment. The Complainant failed to establish that the Respondents had knowledge of his protected activity when they took the adverse action. Likewise, the Complainant failed to establish any nexus between his protected activity and the Respondents' adverse action. Finally, the Respondents demonstrated legitimate, nondiscriminatory reasons for the adverse action taken against the Complainant. The Complainant failed to establish that the Respondents' reasons were not the true reasons for the adverse action, but rather a pretext for discrimination.

Recommended Order

Accordingly, in view of the foregoing, and based upon the entire record, I hereby recommend that the claim filed by the Complainant, Oscar B. Shirani, under the Energy Reorganization Act, be dismissed.

A

ROBERT J. LESNICK

Administrative Law Judge

RJL/SR/dmr

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

1. The Final Investigative Report listed the filing date of the complaint as January 28, 2002. However, Mr. Shirani testified that he signed the complaint form on February 27, 2002. (TR 501). Moreover, the Complainant's counsel submitted a cover letter with the complaint. That letter is dated February 28, 2002, and the Certified Mail Receipt was date stamped March 5, 2002. (RX 44). Accordingly, I find that the date of filing was February 28, 2002.

2. 29 C.F.R. 24.2(b).

3. 29 C.F.R. 24.3(b)(2).

4. *Glenn v. Lockheed*, 1998-ERA-35/-50 (ALJ July 15, 1999).

5. *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y Feb. 15, 1995).

6. *Shusterman v. Ebasco Servs., Inc.*, 1987-ERA-27 (Sec'y Jan. 6, 1992).

7. *Frady v. Tennessee Valley Authority*, 1992-ERA-19/-34 (Sec'y Oct. 23, 1995).

8. *Id.*

9. *Webb v. Carolina Power & Light Co.*, 1993-ERA-42 (ALJ July 24, 1996)(aff'd, ARB August 26, 1997).

10. *Id.*

11. *Frady v. Tennessee Valley* Authority, 1992-ERA-19/-34, at 6 (Sec'y Oct. 23, 1995); *Floyd v. Arizona Public Service Co.*, 1990-ERA-39, 5 (Sec'y Sept. 23, 1994).

12. *See, e.g., Frady v. Tennessee Valley Auth.*, 92-ERA-19/-34, at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *see also Indiana Metal Prod. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971).

13. *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y Feb. 15, 1995).

14. *Shusterman v. Ebasco Services, Inc.*, 1987-ERA-27 (Sec'y Jan. 6, 1992).

15. *Frady v. Tennessee Valley Authority*, 1992-ERA-19/-34 (Sec'y Oct. 23, 1995).

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2006

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-4455

OSCAR B. SHIRANI, *Petitioner,*	Petition for Review of an Order of the Department of Labor
v.	No. 03-ARB-100

UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

EXELON CORPORATION,
Intervening Respondent.

ORDER

On August 14, 2006, the petitioner filed a petition for rehearing and for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.